Official Arkansas Supreme Court Opinion

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SUPREME COURT OF ARKANSAS

No. CR 10-635

Opinion Delivered October 28, 2010

DAMONT LATRELL EWELLS
Appellant

v.

STATE OF ARKANSAS
Appellee

PRO SE MOTION FOR EXTENSION OF TIME TO FILE BRIEF AND MOTION FOR ACCESS TO TRANSCRIPT [CIRCUIT COURT OF GARLAND COUNTY, CR 2006-141, HON. JOHN WRIGHT, JUDGE]

APPEAL DISMISSED; MOTIONS MOOT.

PER CURIAM

In 2007, appellant Damont Latrelle Ewells was found guilty by a jury of two counts of possession of a controlled substance with intent to deliver and sentenced as a habitual offender to an aggregate term of 756 months' imprisonment. The Arkansas Court of Appeals affirmed. *Ewells v. State*, 2010 Ark. App. 43.

Appellant subsequently filed in the trial court a verified timely pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2010). The petition was denied. Appellant lodged an appeal here and now seeks by pro se motions an extension of time to file the appellant's brief and access to the transcript of his trial.

We need not address the merits of the motions because it is clear from the record that appellant could not prevail on appeal if the appeal were permitted to go forward. Accordingly, the appeal is dismissed, and the motions are moot. An appeal from an order that denied a

petition for postconviction relief will not be permitted to proceed where it is clear that the appellant could not prevail. *Goldsmith v. State,* 2010 Ark. 158 (per curiam); *Watkins v. State*, 2010 Ark. 156, 362 S.W.3d 910 (per curiam); *Meraz v. State*, 2010 Ark. 121 (per curiam); *Smith v. State*, 367 Ark. 611, 242 S.W.3d 253 (2006) (per curiam).

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Watkins*, 2010 Ark. 156; *Jamett v. State*, 2010 Ark. 28, 358 S.W.3d 874 (per curiam) (citing *Britt v. State*, 2009 Ark. 569, 349 S.W.3d 290 (per curiam)). A finding is clearly erroneous when, although there is evidence to support it, the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Polivka v. State*, 2010 Ark. 152, 362 S.W.3d 918; *Jamett,* 2010 Ark. 28; *Anderson v. State*, 2009 Ark. 493 (per curiam); *Small v. State*, 371 Ark. 244, 264 S.W.3d 512 (2007) (per curiam). In making a determination on a claim of ineffectiveness of counsel, the totality of the evidence before the fact-finder must be considered. *Smith v. State*, 2010 Ark. 137, 361 S.W.3d 840 (per curiam); *State v. Barrett*, 371 Ark. 91, 263 S.W.3d 542 (2007).

In an appeal from a trial court's denial of postconviction relief on a claim of ineffective assistance of counsel, the sole question presented is whether, based on a totality of the evidence, under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), the trial court clearly erred in holding that counsel's performance was not ineffective. *Smith*, 2010 Ark. 137, 361 S.W.3d 840; *French v. State*, 2009

Ark. 443 (per curiam); *Small*, 371 Ark. 244, 264 S.W.3d 512. Under the two-pronged *Strickland* test, a petitioner raising a claim of ineffective assistance must first show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment to the United States Constitution. *Harrison v. State*, 371 Ark. 474, 268 S.W.3d 324 (2007); *Barrett*, 371 Ark. at 95–96, 263 S.W.3d at 546. In doing so, the claimant must overcome a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Barrett*, 371 Ark. at 96, 263 S.W.3d at 546.

With respect to the second prong of the test, the petitioner must show that counsel's deficient performance so prejudiced petitioner's defense that he or she was deprived of a fair trial. *Jamett*, 2010 Ark. at 28; *Walker v. State*, 367 Ark. 523, 241 S.W.3d 734 (2006) (per curiam). Such a showing requires that the petitioner demonstrate a reasonable probability that the fact-finder's decision would have been different absent counsel's errors. *Sparkman v. State*, 373 Ark. 45, 281 S.W.3d 277 (2008). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

In his Rule 37.1 petition, appellant alleged that he was not afforded effective assistance of counsel at trial. First, he contended that counsel failed to make or renew a request for directed verdict. The trial record, however, reflects that counsel made a motion for directed verdict and renewed it at the appropriate time. Accordingly, there was no basis in fact for the allegation. To the degree that the allegation can be construed as claiming that the motions for directed verdict were not sufficient, appellant did not offer in the Rule 37.1 petition any

substantiation for the claim that there were grounds for an expanded motion for directed verdict. If there were grounds that should have been included in the motion for directed verdict that would have changed the outcome of the proceeding and, thus, met the second prong of the *Strickland* test of demonstrating prejudice, appellant was required to raise those grounds in the Rule 37.1 petition. *Joiner v. State*, 2010 Ark. 309 (per curiam); *see also Wheat v. State*, 297 Ark. 502, 763 S.W.2d 79 (1989) (per curiam). As he did not make such a showing of prejudice, he did not show that counsel was ineffective under the *Strickland* standard. Counsel is not ineffective for failing to make an argument that is meritless. *Johnson v. State*, 2009 Ark. 553 (per curiam).

Secondly, appellant argued that counsel should have objected to the trial court's decision to order the sentences in his case served consecutively. The jury specifically noted that it desired consecutive sentences to be imposed. Counsel for appellant asked that the court exercise its discretion and order the sentences served concurrently, but the court declined. In the Rule 37.1 petition appellant acknowledges that the court had authority to accept the jury's recommendation or refuse to accept it. He did not explain what factual substantiation counsel could have advanced to the court in favor of a concurrent sentence. As a result, he did not establish that there was any basis for a further objection to the sentence sufficient to demonstrate that counsel was ineffective. *See Polivka*, 2010 Ark. 152.

Appellant also contended in the Rule 37.1 petition that his attorney failed to request a jury instruction on a lesser included offense with respect to the drug charges. As the trial

record reflects that the jury was indeed instructed on lesser included offenses, the allegation was baseless.

Appellant argued in the petition that he was generally dissatisfied with counsel throughout the proceeding against him and that there was a breakdown in communication between him and counsel. He further mentioned a conflict of interest that existed, but that conflict appears to have lain in appellant's lack of rapport with counsel inasmuch as appellant did not specify any other type of conflict. Because appellant failed to provide any factual substantiation to demonstrate that his dissatisfaction and lack of communication with counsel resulted in particular prejudice to the defense, there was no ground stated to warrant postconviction relief. We have repeatedly held that conclusory claims are insufficient to sustain a claim of ineffective assistance of counsel. *Joiner*, 2010 Ark. 309. Conclusory claims of ineffective assistance of counsel, no matter how numerous, do not add up to a showing of incompetence of counsel under the *Strickland* standard. Where a convicted defendant alleges many instances of ineffective assistance of counsel, at least one error standing alone must meet the standard of *Strickland* for the defendant to be successful. *Robertson v. State*, 2010 Ark. 300, 367 S.W.3d 538 (per curiam). This court does not recognize an ineffective assistance of counsel claim based on the cumulative effect of counsel's alleged errors. *Id.*; *Echols v. State*, 354 Ark. 530, 127 S.W.3d 486 (2003); *Huddleston v. State*, 339 Ark. 266, 5 S.W.3d 46 (1999).

Finally, appellant alleged that his attorney should have objected to an illegal seizure of cocaine from his person. He contended that he did not consent for his person to be searched,

and counsel should have filed a motion to suppress the evidence. A motion to suppress the evidence was filed prior to trial and denied by the court. Appellant offered nothing to show that there was some meritorious ground for the motion not raised by counsel. Again, an allegation of ineffective assistance of counsel not supported by facts is insufficient to demonstrate prejudice. *Eastin v. State*, 2010 Ark. 275.

Appeal dismissed; motions moot.